Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
LEVEL 3 COMMUNICATIONS LLC	)	
	)	WC Docket No. 03-266
Petition for Forbearance Under	)	
47 U.S.C. § 160(c) from Enforcement	)	
of 47 U.S.C § 251(g), Rule 51.701(b)(1),	)	
and Rule 69.5(b)	)	

BELLSOUTH REPLY

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BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), submits its Reply to comments submitted in response to the *Public Notice* in the above referenced proceeding released by the Commission on January 2, 2004.[1]

INTRODUCTION AND SUMMARY

There are a number of common points made in supporting comments and in opposition comments with which BellSouth agrees: the current access charge regime should continue to be reformed and simplified;[2] the services that Level 3 offers may very well be interstate services,[3] they are very likely information services,[4] and all providers of such services should be subject to

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1 *Pleading Cycle Established for Petition of Level 3 for Forbearance from Assessment of Access Charges on Voice-Embedded IP Communications*, WC Docket No. 03-266, *Public Notice*, DA 04-1 (rel. Jan. 2, 2004).

2 Information Technology Association of America ("ITAA") Comments at 2; MCI Comments at 5; SBC Comments at 8; Sprint Comments at 2.

3 AT&T Comments at 4-10; Global Crossing North America Inc. ("Global Crossing") Comments at 4; Verizon Comments at 4-6.

4 ICG Telecom Group, Inc. ("ICG") Comments at 2; MCI Comments at 8; SBC Comments at 9.

light, but even-handed, regulation.[5] But this does not mean that, as jurisdictionally interstate information services delivered to or from third-party subscribers to the public switched telephone network ("PSTN"), they are (or should be) automatically exempt from interstate access charges.[6] Under the Commission's current regulatory framework, the cost of the PSTN is borne equitably by all service providers that send traffic to the PSTN, irrespective of where the traffic originated. Granting the instant petition would disrupt both the existing regime and the process of "measured, holistic" reform that the Commission and the industry have engaged in since passage of the 1996 Act.[7]

Commenters supporting Level 3's petition continue to make unsupported, or unsupportable, assertions of fact and law that are rebutted by the petition's opponents. The supporting comments continue to bootstrap and distort Commission *dicta* contained in non-final agency actions in order to gain discriminatory regulatory advantages in the marketplace. In doing so, they mischaracterize the *status quo* of the access charge regime, the scope of the ESP exemption, and raise issues, such as appropriate regulatory classification and jurisdiction for IP-enabled services, that don't need to be resolved in this proceeding.

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5 SBC Comments at 30; Verizon Comments at 1, 17.

6 BellSouth Comments at 6; SBC Comments at 13-18; Verizon Comments at 8-11.

7 SBC Comments at 6.

I. IP-PSTN TRAFFIC, WITH LIMITED EXCEPTION, IS SUBJECT TO ACCESS CHARGE RULES IN EFFECT AT PASSAGE OF THE 1996 ACT

Parties supporting Level 3 state that access charges do not apply to the traffic described in the petition for three reasons: (1) the Commission has never created access rules specifically applicable to IP telephony;[8] (2) IP telephony, as an information service, qualifies for a blanket exemption from the existing access charge regime;[9] and (3) IP telephony providers, as information service providers, are not carriers, and therefore do not have to pay access charges. [10] The record refutes all three arguments.

1. The Traffic Described in the Petition Has Always Been Subject to Access Charges.

Level 3 uses the PSTN in the same way as any other interexchange carrier to originate and terminate interexchange calls.[11] Other interexchange carriers pay access in recognition of the fact that their use imposes costs on the underlying LEC network.[12] Level 3's offerings constitute an interexchange service to which the current rules require that access charges be assessed.[13] Indeed, access rules and regulations form the only lawful mechanism by which toll providers must compensate access providers for the use of their facilities.[14] Contrary to AT&T's assertions, the Commission has articulated a statutory basis for the distinction between compensation for the transport and termination of local traffic and compensation for access

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8 AT&T Comments at 12-13, CompTel/ASCENT Alliance ("CompTel") Comments at 2-3; ICG Comments at 2-3; USA Datanet Comments at 4-6.

9 Global Crossing Comments at 8; ICG Comments at 5.

10 MCI Comments at 3.

11 Comments of the Alabama Mississippi Telecommunications Association, *et al.* ("Rural Companies") at 7-11.

12 National Telecommunications Cooperative Association ("NTCA") Comments at 8.

13 GVNW Consulting Comments at 3.

14 ICORE Companies ("ICORE") Comments at 5.

service.[15] Level 3 is providing a service that allows its customers to engage in a real-time voice conversation during a phone-to-phone call with customers of other carriers located on the PSTN, and such a service is undeniably a service to which access charges and universal service payments apply.[16]

OIU and HTC correctly characterize the "wishful thinking" underlying the arguments built around the 1998 *Report to Congress* – a legal basis for these arguments simply "does not exist."[17] This argument stems from AT&T's specious advocacy in its petition to have PSTN-to-PSTN calls that are routed over IP transport exempted from access charges.[18] As BellSouth and others have demonstrated, AT&T's arguments are completely unsound from the standpoint of the Administrative Procedures Act.[19] Yet they continue to be embraced by carriers seeking to benefit from regulatory arbitrage with each day that the AT&T petition goes undecided.[20] The Commission should reject this line of argument completely, just as it should the AT&T and Level 3 petitions. As AT&T itself put it:

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15 Oregon-Idaho Utilities and Humboldt Telephone Company ("OIU/HTC") Comments at 3.

16 Verizon Comments at 6-7. MCI is wrong to suggest that SBC supports the notion that access charges don't apply to the traffic described in the petition. *Cf.* MCI comments at 4, n.11 (suggesting SBC takes a different view than Verizon on the applicability of access charges) with SBC comments at 9-10 (Under current law, VoIP calls are subject to access charges when they originate or terminate in circuit-switched format on the PSTN).

17 OIU/HTC Comments at 4.

18 Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361 (filed Oct. 18, 2002).

19 Letter from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361 (Jan. 9, 2004); Memorandum dated January 14, 2004 and attached to letter from James C. Smith, Senior Vice President, SBC Telecommunications, Inc., to Michael K. Powell, Chairman, Federal Communications Commission, WC Docket Nos. 02-361, 03-211 & 03-266 (Jan. 14, 2004).

20 Even a supporter of Level 3's petition draws the line at AT&T's petition, specifically observing that AT&T's service is a "distinction without a difference." Progress and Freedom Foundation Comments at 4 (footnote omitted).

> Nowhere is this inequity more blatant than in the case of phone-to-phone telecommunications services that use Internet Protocol ("IP") technology in their long-haul networks . . . . [A]ny failure to enforce . . . access charge payment obligations flies in the face of the Commission's commitment to technology-neutral policies, and triggers more artificially-stimulated migration from traditional circuit switched telephony to packet switched IP services that are able to take advantage of this "loophole."[21]

2. Even if the Traffic Described in the Petition Were an Information Service, It Is Not Subject to the ESP Exemption.

Both SBC and Verizon provide a concise background of the genesis and scope of the Commission's current ESP exemption.[22] These analyses undermine any reliance on that limited exemption as a basis for an argument that access charges have never applied to interexchange IP communications that originate and terminate on the PSTN. Moreover, Verizon clearly shows that when it created the access-charge regime, the Commission's "intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers *and enhanced service providers*."[23]

Indeed, while the Commission's Part 69 rules were written in terms of carrier charges and end user charges, the access tariffs which implemented those rules did not restrict purchasers of access based on the classification of the customer as an end user or interexchange carrier. From the outset, the Commission never intended to limit the application of access charges to just carriers:

> Some petitioners contend that enhanced services should not be subjected to access charges because the providers and users of those services did not receive sufficient notice

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21 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Report to Congress), AT&T Comments on Report to Congress at 12-13 (filed Jan. 26, 1998).

22 SBC Comments at 13-18, Verizon Comments at 8-11.

23 Verizon Comments at 8. *See also* SBC Comments at 10-11, n.18 (the Commission has consistently recognized that ISPs are users of exchange access services, and thus are subject to the baseline obligation to pay access charges absent an exemption).

> that this proceeding might affect the amounts that they pay for access. We do not find that contention persuasive. The *Initial Notice* in this docket advised all persons that we expected to examine all forms of access compensation for interstate and foreign telecommunications in a comprehensive manner. None of the subsequent *Notices* expressed any intention to narrow the scope of this proceeding. Moreover, the local business rate, or B-1, charges which have been paid for enhanced service access in the past merely represent another application of the method the telephone industry has traditionally used to obtain access compensation from FX customers. The *Second Supplemental Notice* clearly indicated that we viewed the relationship among FX, ENFIA, MTS, and WATS access compensation as a central problem that must be resolved in order to establish access compensation for MTS/WATS equivalent services. The use of B-1 rates for enhanced service access is part of the same generic problem, since enhanced service providers use local exchange facilities in the same or similar manner as do these services. Therefore, vendors of enhanced services should have known that any final decision in the access charge phase of this proceeding would be likely to affect the charges they pay for access.[24]

When an end user directly seeks to obtain access to local exchange facilities in order to originate or terminate interstate communications, the end user must purchase an interstate service from an interstate tariff. Where an end user seeks to use the public switched network, the end user would purchase switched access, which is the only interstate tariff that offers use of local exchange network for the origination and termination of interstate communications. For example, in order to create an interstate FX, an end user would have to purchase Feature Group A at the open end of the FX and pay the switched access charges associated with the Feature Group A.[25]

The Commission created limited exceptions to the nondiscriminatory access charge scheme adopted in CC Docket 78-72. One exception was the leaky PBX, where an interstate communication over an interstate private line was routed through a PBX and then "leaked" into

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[24] *MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I, *Memorandum Opinion and Order*, 97 FCC 2d 682, 763, ¶ 204 (1983) ("*MTS/WATS Market Structure Order*").

[25] *See also Petition of First Data Resources, Inc. Regarding the Availability of Feature Group B Access Service to End Users, Memorandum Opinion and Order*, 1986 FCC LEXIS 3347 at *15, ¶ 13 (1986) (Interstate access services should be made available on a non-discriminatory basis and, as far as possible, without distinction between end user and interexchange carrier customers, *citing* Sections 201 and 202(a) of the Communications Act).

the local exchange network.[26] As both SBC and Verizon note, another exception was the enhanced services exemption from access charges. The Commission was concerned that full application of access charges on certain private users at the outset could be disruptive. Accordingly, the Commissioned fashioned a transition plan that would ease the impact of access charges on private users who were paying local business line rates for interstate access but otherwise would have to pay access charges once the access tariffs were implemented:

> Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. One of our paramount concerns in fashioning a transition plan is the customer impact or market displacement that any proposed remedy might cause. Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability. The case for a transition to avoid this rate shock is made more compelling by our recognition that it will take time to develop a comprehensive plan for detecting all such usage and imposing charges in an evenhanded manner. We would envision that once a procedure is implemented by which the exchange carriers charge all access service users for their usage on an equal basis, the level of carrier access charges in general should fall as the universe of liable entities is expanded. For this reason also, it would be unreasonable immediately to increase as much as tenfold the charges paid by customers who do not presently come under the coverage of the current ENFIA tariff.[27]

Enhanced service providers, prior to the adoption of access charges, had been paying local business rates for the purposes of connecting to their enhanced services customers to deliver to those customers the enhanced service to which the customer subscribed. To the extent the enhanced service took its customer to an interstate database or otherwise involved interstate communications, the enhanced service provider obtained interstate services from interexchange

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[26] In that instance, the local carrier would not be able to identify and measure interstate minutes and assess access charges. To cover the cost of the interstate use of the local network, the Commission created the leaky PBX surcharge that was assessed on interstate private lines terminating in a PBX.

[27] *MTS/WATS Market Structure Order*, 97 FCC 2d at 715, ¶ 83.

carriers (and to the extent such carriers used local exchange facilities to deliver these services, access charges applied). For example, in a typical voice messaging service, the voice mail provider could provide an option that allows the customer to launch a call from the voice mail platform. If the call were an interstate interLATA call, access charges would apply notwithstanding that the call originated from an enhanced services platform.

Therefore, as SBC and Verizon demonstrate, in the case of IP-enabled information services, where such services enable the information service provider's customers to communicate with any person via the public switched network, use of the public switched network does not fall within the limited access charge exemption created by the Commission since the use of the local network is not for the purpose of delivering an enhanced/information service to the information service provider's customer.[28] From the very beginning, enhanced service providers, as end users, were part of the "expanding universe of liable entities" subject to reasonable and non-discriminatory access charges published in LEC tariffs.[29]

II. IT IS INAPPROPRIATE TO REFORM ACCESS CHARGES ON A PIECEMEAL BASIS

No carrier in support of the petition offers any compelling reason why the Commission should afford special treatment to one category of carriers alone. Indeed, the rhetoric invoked by the petition and its supporting comments is as fragile as a house of cards, premised on the flawed and unstable assumptions that access charges do not apply to the traffic described in the petition, and that the outcome of the pending intercarrier compensation proceeding is a foregone

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[28] BellSouth believes that it is more important at the present time to clarify the limited scope of the ESP exemption rather than to eliminate it entirely, as advocated by NTCA at 6-7. While calls for elimination of the exemption are understandable in light of the exemption's unwarranted expansion by Level 3 and its advocates, the Commission's current rules already establish a rational distinction between exempted calls and non-exempted calls. The Commission need only reaffirm the scope of its existing rule.

[29] *Supra* n. 27.

conclusion.[30] Granting the petition would, pure and simple, be a grant of regulatory preference.[31] As Sprint observes, Level 3's proposal does nothing to rationalize the regulatory structure; to the contrary, it simply carves out yet another exception to existing rules, exempting "voice-embedded IP services" from paying switched access charges even when such services use local exchange networks in exactly the same fashion as other traffic which is subject to access charges.[32] This could have a number of disruptive and market distorting effects, which Sprint catalogues.[33]

Moreover, the Iowa Utilities Board notes that the current docket does not allow for an extensive review of all the potential impacts on the industry, has the potential to undermine existing methods of intercarrier compensation, and could give rise to problematic precedent.[34] The CPUC similarly observes that grant of the petition may significantly and in the near term undermine the availability and affordability of voice telephone service to individuals in high cost areas and to the deaf and disabled.[35] Both these agencies urge this Commission to act on the pending IP-Enabled Services Rulemaking first; the Commission clearly should heed the calls to resolve these issues comprehensively in its intercarrier compensation proceeding and in the general IP-Enabled Services rulemaking rather than through piecemeal petitions for forbearance.

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30 *See, e.g.*, ICG Comments at 6 (The Commission should not impose access charges on "new" services only to remove them).

31 Comments of the Independent Telephone & Telecommunications Alliance, *et al.* ("Associations") at 3.

32 Sprint Comments at 2.

33 *Id.* at 4-5.

34 Iowa Utilities Board Comments at 3.

35 Comments of the People of the State of California and the California Public Utilities Commission ("CPUC") at 4.

III. THE RECORD OVERWHELMINGLY DEMONSTRATES THAT THE PETITION FAILS THE THREE-PRONG STATUTORY FORBEARANCE TEST

The oppositions have overcome the limited "showing" Level 3 and its supporters have attempted to make with respect to the Commission's three prong test,[36] and the arguments need not all be reiterated here. But the chief point is that forbearance is precisely the wrong step to take if the Commission is to assure reasonable and non-discriminatory treatment of carrier and end user customers of interexchange and exchange access services alike as required by the statute. Moreover, the Commission should reject some of the more novel attempts at public interest justification: Pinpoint Communications' xenophobic appeals,[37] and MCI's attempts to turn back the clock and perpetuate legacy economic regulation on so-called "broadband bottlenecks."[38]

Characteristic of the rhetoric is the equation of "economic regulation" *only* with access charges,[39] and not the "entire range of common carrier regulation."[40] What is left unexplained is why reasonable and non-discriminatory access charges, evenly applied to all users of the PSTN, will kill "nascent" and "blossoming" IP-enabled services or drive jobs and capital out of this country, but the imposition of "social" and "policy" regulations, such as CALEA, E911 and the like, which nobody is willing to oppose, will not. What is conspicuously absent from the picture is the presence of cable television giants with their ubiquitous broadband networks and other

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36 *See* America's Rural Consortium ("ARC") Comments at 6-8; ICORE Comments at 12-16; Associations' Comments at 4-5; Nebraska Rural Independent Companies' ("Nebraska Companies") Comments at 2-11; NTCA Comments at 3-4; SBC Comments at 18-29; Verizon Comments at 11-19.

37 Pinpoint Communications, Inc. ("Pinpoint") Comments at 5.

38 MCI Comments at 8.

39 *See, e.g.*, CompTel Comments at 8.

40 Verizon Comments at 1.

intermodal broadband competitors. The only thing that is clear from the record is that it is most decidedly not in the public interest to grant the regulatory protectionism sought by the petition.

CONCLUSION

The Commission should, in denying the petition, clarify that its existing access charge rules apply to the traffic described in the petition, because even if it were an information service, the traffic described in the petition is beyond the scope of the ESP exemption.

Respectfully submitted,

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I do hereby certify that I have this 31st day of March 2004 served the following parties to this action with a copy of the foregoing **REPLY** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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